Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-245

DAY & ZIMMERMANN, INC.,
Petitioner,

versus

HAWLEY K. CHALLONER, DAVID E. NELMS, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DANIEL E. NELMS, AND MARY EDNA NELMS,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Statement of the Case	1
Opposition to Question I	2
Opposition to Question II	9
Conclusion	13
Certificate of Service	14
Appendix A	1a
Appendix B	4a

INDEX OF AUTHORITIES

SECONDARY AUTHORITIES

Banco Nacional de Cuba v. Sabbationo, 371 U.S. 84 (1964)	6
Barth v. B. F. Goodrich Co., 265 A.C.A. 253, 71 Cal. Rptr. 306 (1968)	10
Click v. Thuron Industries, Inc., 475 S.W. 2d 715 (Tex. 1972)	3
Continental Oil Company v. Lane Wood & Company, 443 S.W. 2d 698 (Tex. 1969)	2,3,5
Couch v. Mobil Oil Company, 327 F. Supp. 897 (S.D. Tex. 1971)	6
Darryl v. Ford Motor Co., 440 S.W. 2d 630 (Tex. 1969)	10
Day & Zimmermann v. Calvert, 519 S.W. 2d 106 (Tex. 1975)	2,11
Foster v. Day & Zimmermann, Inc., 502 F.2d 867 (8th Cir. 1974)	12

INDEX OF AUTHORITIES (Continued)

Page

Howard v. Lyons, 360 U.S. 593 (1929) 7

Lester v. Aetna Life Insurance Company, 433 F.2d 884, cert. den. 402 U.S. 909 (1970) 5

Malinak v. Firestone Tire & Rubber Co., 436 S.W. 2d 210 (Tex.Civ.App. — Houston 1st Dist 1969) 10

Marmon v. Mustang Aviation, Inc., 430 S.W. 2d 182 (Tex. 1968) 2,3

McKisson v. Sales Affiliates, Inc., 416 S.W. 2d 787 (Tex. 1967) 9,10

Putman v. Erie Manufacturing Co., 338 F.2d 911 (5th Cir. 1964) 10,11

Rourke v. Garza, 511 S.W.2d 331 (Tex. Civ.App. — Houston, 1974) 9

The Schooner Exchange v. M'Faddon, 7 Cranch 116, 3 L.Ed. 287 (1812) 8

United States v. Standard Oil Co., 332 U.S. 301 (1947) 6

TERTIARY AUTHORITIES:

Hill, "HOW STRICT IS STRICT?".. 32 Tex. Bar. Journ. (Nov. 1969) 759 10

Restatement of Torts 2d, Sec. 402 A 9,10,11,13

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STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case as being substantially correct except the statements contained in Page 4 of Petitioner's brief which state: "The sole plant function was to load, assemble, and pack (as distinguished from manufacture) ammunition from materials purchased and owned exclusively by the United States Government" and "There was no sale by Petitioner to the United States of any product, and it never had any right of ownership in the ammunition." Respondent would submit that these two recitations are incorrect and that in fact Day

& Zimmermann, Inc., did purchase the component parts from vendors and did sell the completed product to the United States Government. This fact has been reduced to certainty by the judicial holding of the Texas Supreme Court in *Day v. Zimmermann v. Calvert*, 519 S.W. 2d 106 (Tex. 1975).

OPPOSITION TO QUESTION I

THE COURT OF APPEALS CORRECTLY APPLIED THE LAW OF TEXAS, OR, IN THE ALTERNATIVE, CORRECTLY PREDICTED WHAT THE TEXAS SUPREME COURT WOULD HAVE HELD HAD IT BEEN PRESENTED WITH THE SAME QUESTIONS.

The claim for injury of Plaintiff Challoner and the wrongful death claim of Plaintiff Nelms' survivors are not based on Arts. 4671 and 4678, Tex. Rev. Civ. Stats., but on judgment made Texas choice-of-law rules for torts and wrongful death which, having shown considerable capacity of evolution in the past, is capable of evolution in the present. Consequently, the Texas Supreme Court could, and in the light of *dicta* in *Marmon v. Mustang Aviation, Inc.*, 430 S.W. 2d 182 (Tex. 1968) and the language in *Continental Oil Company v. Lane Wood & Company*, 443 S.W. 2d 698 (Tex. 1969) in all probability would, refuse to follow the *lex loci delicti* rule in a case like the present one, where Cambodia's "connection with the transaction is minimal and fortuitous, and (where) it has no interest in the . . . controversy." *Continental Oil Company v. Lane Wood & Company, supra*, at P. 701.

While Petitioner is correct in its statement that the Texas Supreme Court has refused to give extraterritorial effect to the Texas Wrongful Death Statute in controversies involving sister states, *Marmon v. Mustang Aviation, Inc., supra*, and *Click v. Thuron Industries, Inc.*, 475 S.W. 2d 715 (Tex. 1972), petitioner is incorrect in stating that the Court of Appeals applied its own "choice of law" rule because the Texas Supreme Court has not been presented with a similar case involving a foreign nation whose interest is only minimal and fortuitous.

In fact the Texas Supreme Court appears to have taken a decisive step towards adopting a new approach to conflict of laws in the *Continental Oil Company Case, supra*. The facts of that case are unusually complex. An Ohio manufacturer (Carlon) had sold a quantity of plastic pipes to an Amarillo distributor (Allied), which resold them to the ultimate purchaser (Western), delivery being effected by the distributor's trucks at the ultimate purchaser's job site in Oklahoma. Allied's check to Carlon was dishonored, and it went into bankruptcy. Western paid the purchase price for the pipes into Court, and there was a dispute between the manufacturer's successor (Continental), and the bankrupt's Texas factor and assignee (Lane Wood) over this fund. At the time of the transactions, Ohio and Oklahoma had adopted the U.C.C. but Texas had not. Under the U.C.C. (now Sec. 2.403, Tex. Business and Commerce Code) the entrusting of the goods to a merchant dealing with goods of that kind gives the latter power to transfer all rights of the entruster in the ordinary course of business.

After noting that there was a choice-of-law question, Mr. Justice Walker went on to observe for a unanimous Texas Supreme Court:

> "As for the sale from Allied to Western, the order was placed with Allied's office in Amarillo by Western's office in El Paso. It directed that the pipe be shipped best way prepaid. Allied then arranged for the pipe to be delivered to its trucks at Carlon's plant in Corsicana on unrestricted bills of lading consigned to Western at Texhoma, Oklahoma. The sale was then arranged in Texas between parties doing business here. The pipe had not previously been in Oklahoma but was moved there solely for the purpose of making delivery to Western. Any title owned by Allied would have passed in Texas if it had elected to make delivery by common carrier rather than by its own trucks. It does not appear that Continental, Carlon, Allied or Western is a resident of Oklahoma. Lane Wood is a Texas corporation and relies on the law of this state to give priority and effect to its assignment of accounts and factor's lien agreement. *Oklahoma's connection with the transaction is minimal and fortuitous, and it had no interest in the present controversy.* We hold that the Texas Law controls." (Emphasis added) at P. 701.

This case is clear authority that under current Texas choice-of-law rules, the law of a foreign state will not be applied if its "connection with the transaction is minimal and fortuitous, (if) it has no interest in the

controversy." Or, stated another way, the law of a foreign state will not be applied where there is a *false conflict*.

This is exactly what the Court of Appeals held in the present case, i.e., Cambodia's connection with the controversy between Challoner and Nelms v. Day & Zimmermann, Inc., is "minimal and fortuitous and it has no interest in the controversy. This is in accord with the *Continental Oil Company Case, supra*, and with *Lester v. Aetna Life Insurance Company*, 433 F.2d 884, cert. den., 402 U.S. 909 (1970).

Lester, supra, was a diversity action on a life insurance policy. Plaintiff-beneficiary was a Louisiana citizen; defendant-insurer was a Connecticut Insurance company which did business and which had issued the policy in Wisconsin. The action began in Louisiana State Court and was removed to Federal Court.

The insurer's defense was that the policy had been cancelled. Plaintiff claimed the cancellation was ineffective because it was not proceeded, as required by Louisiana Law, by written notice that premiums were due. Defendant relied on Wisconsin Law which required no notice. The issue was whether Louisiana or Wisconsin Law applied.

The Fifth Circuit held that this was a "false conflict" since Wisconsin had no interest in the case and applied the law of Louisiana. The Wisconsin Law was designed for the protection of Wisconsin insurers. Defendant was not a Wisconsin insurer; thus, Wisconsin had no interest in the case. The *Lester* principle

should control here in a controversy between American citizens.

The Cambodian requirement that fault be proved is a policy designed to afford a high degree of protection for Cambodian manufacturers; Cambodia is indifferent to the protection of American manufacturers. Thus, a false conflict.

The holding in the case at bar is also in accord with the holding in *Couch v. Mobil Oil Company*, 327 F. Supp. 897 (S.D. Tex. 1971). That case involved a tort claim by an American citizen against an American company for an injury occurring in Libya. The Court refused to apply Libyan Law and applied the law of Texas.

The Court of Appeals, therefore, adopted the correct Choice of Law Rule and the one the Texas Supreme Court probably would have adopted, since Cambodia had no interest in the case.

If this Court is convinced that Texas would follow *lex loci delicti* under the facts of this case, then, in the alternative, Plaintiffs-Respondents would argue that there exists a "federal common law" of conflicts which should be applied here. This Court has applied federal Choice-of-Law Rules in cases involving American citizens and foreign nations. *Banco Nacional de Cuba v. Sabbationo*, 371 U.S. 84 (1964); *United States v. Standard Oil Co.*, 332 U.S. 301 (1947).

In the *Standard Oil Case, supra*, this Court stated at P. 308:

> ". . . there remains what may be termed, for want of a better label, an area of 'federal common law' or perhaps more accurately 'law of independent federal judicial decision', outside the constitutional realm, untouched by the *Erie* decision."

The present case is such a case and the states should not be allowed to decide questions affecting international relations. *Howard v. Lyons*, 360 U.S. 593 (1929).

Furthermore, by treaty, Cambodia ceded to the United States the right to apply its law to American material and personnel. Attached hereto as Appendix "A" is the agreement affected by a change of notes signed at Phnom Penh, August 20, 1970; which went into force on that date. The Court will note that in Paragraph 1 of such agreement:

> "All defense articles furnished to the Government of Cambodia shall be subject to the requirements of United States Law . . . and
>
> * * *
>
> (2) . . . United States Government personnel discharging the responsibilities specified in this paragraph will operate as a part of the Embassy of the United States of America under the direction and control of the Chief of the Diplomatic Service and will have the same privilege and immunities as are accorded other personnel in comparable position in the Embassy of the United States."

This agreement is in accord with this Court holding in *The Schooner Exchange v. M'Faddon*, 7 Cranch 116, 3 L.Ed. 287 (1812).

> "A (nation) is understood to cede a portion of (her) territorial jurisdiction where (she) allows the troops of a foreign nation to pass through (her) dominions." P. 139.

In either event, whether the Court of Appeals applied what it believed to be the Law of Texas or applied a federal Choice-of-Law Rule, strict liability must apply since Cambodia has absolutely no interest in the controversy. "[T]he public interest in human life and health requires . . ."[1] the application of strict liability in this case.

It should further be brought to the Court's attention that Defendant, Day & Zimmermann, Inc., is acting inconsistently and in bad faith by contending that Cambodian Law should apply. In the case of *Burns v. Day & Zimmermann, Inc.*, 71 CIV, 3205, U.S. District Court, Southern District of New York, the same Defendant stipulated that Texas Law was applicable as is evidenced by the Stenographer's Minutes attached hereto as Appendix "B". In that case the Plaintiffs brought suit against the same Defendant for a premature explosion of a defective shell, said explosion occurred within the country of Viet Nam. The Court will note that on Page 2 of the Minutes of the case that Mr. Brumbelow, the attorney for Defendant, Day & Zimmermann, Inc., stipulated that Texas Law is applicable.

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1 Foster v. Day and Zimmermann, Inc., 502 F. 2d 867 (8th Cir., 1974).

OPPOSITION TO QUESTION II

THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE APPLICATION OF THE DOCTRINE OF STRICT LIABILITY BECAUSE DAY AND ZIMMERMANN, INC., WAS A MANUFACTURER OR ASSEMBLER OF GOODS AND TRANSMITTED SAID GOODS INTO THE STREAM OF COMMERCE BY A SALE OR OTHER ESSENTIALLY COMMERCIAL TRANSACTION.

Petitioner, in its attack upon the opinion of the Court of Appeals urges a very restrictive interpretation of the words "sale", "sellers" and "business of selling." Petitioner makes a secondary attack upon the judgment of the Trial Court by attempting to limit the effect of Sec. 402 A, *Restatement of Torts, 2d*. Petitioner also attacks the opinion of the Court of Appeals on some sort of public policy basis. Respondents will answer these attacks in the order listed below.

Texas has never strictly construed the word "sale", "sellers", or "business of selling" from the initial landmark case of *McKisson v. Sales Affiliates, Inc.*, 416 S.W. 2d 787 (Tex. 1967). In fact, in the very recent case of *Rourke v. Garza*, 511 S.W. 2d 331 (Tex.Civ.App. — Houston, 1974), Application for Writ of Error granted ot'r gr'ds, 18 Tex.Sup.Ct.Jour. 169 (1975), The Texas Supreme Court held in fact that a sale is not necessary at all.

In *McKisson v. Sales Affiliates, Inc., supra*, a hair preparation distributor left a sample with a beauty shop owner. Nothing was paid for the product. The beauty shop owner used the product on herself result-

ing in the loss of her hair. The Texas Supreme Court held that this transaction was sufficient "sale" to permit the visitation of liability under Sec. 402 A of the *Restatement of Torts 2d.*

The *McKisson Case* was then followed by the case of *Malinak v. Firestone Tire and Rubber Co.*, 436 S.W. 2d 210 (Tex.Civ.App. — Houston (1st Dist.) 1969, n.r.e.). In that case a tire distributor arranged for Plaintiff to purchase tires from the Firestone Company. The tires were then brought back to the distributor where they were mounted. The record did not show a profit, if any, that might have been realized by the actual installer. The Court held that the transaction was essentially commercial in the character and that Sec. 402 A was applicable. The *Malinak Case* cites with approval the case of *Barth v. B. F. Goodrich Co.*, 265 A.C.A. 253, 71 Cal. Rptr. 306 (1968). In that case the California Court decided that the definition of a sale or of a seller for the purpose of the doctrine of strict liability differs with the general definition of sale or seller as applicable to the law of contracts. It specifically held that neither a transfer of title to the goods nor a sale was required. See also: Hill, "HOW STRICT IS STRICT?", 32 Tex. Bar Jour. (Nov. 1969) 759.

Respondents herein are clearly among the class of persons sought to be protected by 402 A since they are persons who are expected to and who in fact did use or consume the product manufactured or assembled. Neither Rule 402 A nor Texas Law requires that the user or consumer be a member of the general public or even a purchaser of the product. *Darryl v. Ford Motor Co.*, 440 S.W. 2d 630 (Tex. 1969); *Putman v. Erie*

Manufacturing Co., 338 F.2d 911 (5th Cir. 1964). Because the Texas Courts have taken the view that the words "sale", "seller" or "business of selling" are not to be interpreted in the strict sense as in a contract situation, whether or not Day and Zimmermann and the United States Government have a relationship of independent contractor is immaterial to the determination of this suit. The fact remains that Day and Zimmermann produced the product for profit to the ultimate consumer, the United States of America and its employees. This is the essentially commercial transaction that Rule 402 A seeks to cover.

This is further confirmed by Note F under Sec. 402 A, *supra*. That Note states in part that the Rule applied, "to any manufacturer of such a product . . .".

Furthermore, the Texas Supreme Court has recently held that the transaction between Day and Zimmermann, Inc., and the United States Government in fact involves the "sale" of goods from Day and Zimmermann, Inc., to the United States Government and that for some period of time, no matter how fleeting, Day and Zimmermann, Inc., had title to the component parts that ultimately make up the product sold to the government. *Day & Zimmermann, Inc. v. Calvert*, 519 S.W. 2d 106 (Tex., 1975) In that case the Texas Supreme Court held that Day & Zimmermann, Inc., did not have to pay sales tax because of certain exemptions in the Texas Sales Tax Law. In reaching that conclusion the Court found that the transfer of the component parts from the component parts manufacturer to Day & Zimmermann, Inc., involved a sale and the transfer of the completed product from Day & Zimmermann, Inc., to the United States Government constituted a sale.

At Page 110 that Court stated:

> "Title therefore appears to have vested in Day & Zimmermann after inspection and acceptance at the Lone Star Plant, although, as previously stated, the "sale" between Day & Zimmermann and its vendors took place when the good swere readied for shipment to the plant. With reference to the transfer of title from Day & Zimmermann to the Government, after the inspection and acceptance of the materials by Day & Zimmermann, they were labeled as property of the Federal Government . . . .".
>
> "In view of the distinct, identifiable transactions between Day & Zimmermann and its vendor and Day & Zimmermann and the Federal Government, it is clear that the initial purchases by Day & Zimmermann were not taxable under the 'Sale for Resale' exemption. Art. 20-04(0). Additionally, the second sale between Day & Zimmermann and the Federal Government is also exempt . . . .".

Petitioner places much emphasis on policy considerations and list what it considers to be seven policy arguments against the application of strict liability. It is noted, however, that Petitioner does not refer to the case of *Foster v. Day & Zimmermann, Inc.*, 502 F.2d 867 (8th Cir. 1974). The *Foster Case* is almost identical to the case at bar in that it involved the premature detonation of a defectively manufactured hand grenade causing severe injury to a serviceman.

In that case the 8th Circuit likewise reviews the policy considerations involved in the application of strict liability and found that such policy did in fact require the application of Sec. 402 A, *Restatement of Torts 2d.*

In that case the Court specifically stated at Page 871, as follows:

> "In making the grenade and its component parts the defendant knew that it was made for military personnel and that it was to be used by them. We believe the public interest in human life and health requires the protection of the law against the manufacture of defective explosives, whether they are to be used by members of the public at large or members of the public serving in our armed forces. It is true that the defendants herein did not solicit the use of their product *yet they most certainly did reap the profits from its production*. When these factors are considered together, the defendants' argument is unpersuasive." (Emphasis added)

It is considered that Petitioner's arguments are likewise unpersuasive.

CONCLUSION

Respondents pray that Petitioner's Application for Writ of Certiorari should be in all things denied and

that the judgment of the Court of Appeals of the 5th Circuit should remain as written.

Respectfully submitted,

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RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that on this the ___ day of September, 1975, a true and correct copy of the above and foregoing brief for Respondent in Opposition to Petition for Writ of Certiorari was placed in the United States Mail, postage prepaid, to Mr. Norman C. Russell, P. O. Box 1049, Texarkana, Texas 75501, Attorney for Petitioner.

Cahill Hitt

APPENDIX A

CAMBODIA

MILITARY ASSISTANCE

Agreement effected by exchange of notes
Signed at Phnom Penh August 20, 1970;
Entered into force August 20, 1970.

The American Charge d'Affaires and interim to the Minister of Foreign Affairs of Cambodia

PHNOM PENH, August 20, 1970

EXCELLENCY:

I have the honor to refer to recent discussions with the Government of Cambodia concerning the conditions under which defense articles are being furnished to Cambodia. I propose that the following arrangements apply to the provision of these defense articles:

(1) All defense articles furnished to the Government of Cambodia shall be subject to the requirements of United States law and to the following conditions specified in numbered paragraphs 3, 4, 5, 6 and 7 of the Exchange of Notes of May 16, 1955,[1] at Phnom Penh between the Governments of the United States and Cambodia:

> Any military assistance furnished by the United States will be provided on the condition

1 TIAS 3240; 6 UST 996

that no equipment or materials furnished will be used to undertake acts of aggression against any nation.

The Government of Cambodia will utilize the equipment and materials furnished by the Government of the United States solely for the maintenance of its internal security and legitimate defense of its territory.

The Government of Cambodia will assure the safeguarding and the security of any article, service of technical military information furnished by the United States.

The title to or possession of any equipment, materials, information, or services furnished will not be transferred to any person not an officer or agent of the Government of Cambodia, or to a third country, without the prior consent of the competent American authorities.

If this equipment is no longer required for the purposes for which it was originally furnished as specified in paragraph 4 of the present Agreement, the Government of Cambodia will return it to the United States or dispose of it in accordance with the wishes of the Government of the United States.

(2) With regard to the use of these articles, the Government of Cambodia will permit such administrative observation and review as the United States Government may require and provide necessary information to the United States Govern-

ment. United States Government personnel discharging the responsibilities specified in this paragraph will operate as part of the Embassy of the United States of America under the direction and control of the Chief of the Diplomatic Mission and will have the same privileges and immunities as are accorded other personnel in comparable positions in the Embassy of the United States.

(3) These arrangements will apply to all United States military assistance heretofore furnished or which may hereafter be furnished to Cambodia by the United States, whether that assistance is received directly from the Government of the United States or transferred in any other manner to Cambodia.

(4) Cambodia or the United States may in writing request revision or give notice of termination of the present Agreement, which shall be effective upon receipt. In the event of termination the materials and equipment furnished by the United States will continue to be subject to the conditions specified in numbered paragraph 1 of this agreement, which conditions will remain in force until their revision or their termination by a new agreement.

If these terms are acceptable to the Government of Cambodia I have the honor to propose that this note and Your Excellency's note in reply concurring therein shall constitute an agreement between our two Governments, which shall enter into force on the date of your Excellency's reply.

Please accept, Excellency, the renewed assurances of my highest considerations.

Lloyd M. Rives
Charge d'Affaires, a.i.

HIS EXCELLENCY
KOUN WICK,
MINISTER OF FOREIGN AFFAIRS,
PHNOM PENH.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DORIS J. BURNS, as Administrix of the Goods, Chattels, and Credits which were of WENDELL M. BURNS, deceased, and DORIS J. BURNS, individually,

Plaintiff,

against 71 Civ. 3205

DAY & ZIMMERMANN, INC.,

Defendant.

New York, *July 14, 15, 16, 1975*

STENOGRAPHER'S MINUTES

Before:
HON. JOHN M. CANNELLA, D.J. and a Jury.

[2] (Case called.)

MR. BRUMBELOW:
If your Honor please, Mr. Cox couldn't come with me this time. He was tied up on another matter. However, I have brought with me one of our summer law clerks. He is in his third year at Penn, and he has done some research and is familiar with the case, and he is very good at carrying this big, heavy bag, and if your Honor would permit him to sit at counsel table, I would appreciate it.

THE COURT:
All right, fine. I guess there is no objection to that; is there, Mr. Block?

MR. BLOCK:
Of course not, Judge.

THE COURT:
What forum are you in now at this point.

MR. BLOCK:
On the choice of law, Judge?

THE COURT:
Yes.

MR. BLOCK:
I thought we had Texas law.

THE COURT:
You stipulated Texas law last time.

MR. BLOCK:
Yes, we had stipulated Texas law last time.

MR. BRUMBELOW:
Yes, your Honor, that is correct.

THE COURT:
The same here, is it?

MR. BRUMBELOW:
Yes.

MR. BLOCK:
It's not exactly the same here, . . .

* * * *